IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6156

MALLIE LEWIS,

Appellant,

—v.—

CITY OF NEW ORLEANS,

Appellee.

APPEAL FROM THE SUPREME COURT OF LOUISIANA

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Affidavit Charging Mallie Lewis with Reviling the Police, January 8, 1970	3
Affidavit Charging Mallie Lewis with Resisting Arrest, January 8, 1970	5
Ordinance 828 M.C.S. 49-7 (Reviling the Police)	6
Ordinance 828 M.C.S. 49-2 (Resisting Arrest)	6
Trial Transcript, April 17, 1970	7
Judgment of the Criminal District Court Affirming Convictions, December 15, 1970	43
Order of the Louisiana Supreme Court Refusing Writs, March 10, 1971	44
Order of the United States Supreme Court Vacating Judgment and Remanding the Case, June 26, 1972	45

Page

Judgment and Opinions of the Louisiana Supreme Court Affirming Convictions, November 6, 1972 ____ 47

Orders of the Supreme Court of the United States Granting the Motion of the Appellant to Proceed in Forma Pauperis and Noting Probable Jurisdiction ____ 65

Chronological List of Relevant Docket Entries

January 3, 1970:	*Municipal Court.* Affidavits filed charging Mallie Lewis with reviling the police in violation of 828 M.C.S. Section 49-7 and resisting arrest in violation of 828 M.C.S. Section 49-2.
January 5, 1970:	*Municipal Court.* Defendant Mallie Lewis was arraigned and entered a plea of not guilty.
April 17, 1970:	*Municipal Court.* Defendant Mallie Lewis was tried for and found guilty of reviling the police and resisting arrest. Defendant moved for and was granted an appeal to the Criminal District Court.
April 20, 1970:	*Municipal Court.* Defendant Mallie Lewis moved to arrest judgment. The motion was denied.
October 29, 1970:	*Criminal District Court.* The appeal of Mallie Lewis was filed.
December 15, 1970:	*Criminal District Court.* The Court affirmed the conviction and sentence of the Municipal Court.
February 4, 1971:	*Criminal District Court.* Defendant Mallie Lewis filed a Notice of Intention to Apply for Writs and a Motion to Fix Time to Apply for Writs. Court granted the defendant until March 4, 1971 to file for writs in the Louisiana Supreme Court.
March 4, 1971:	*Louisiana Supreme Court.* Application for writs filed.
March 10, 1971:	*Louisiana Supreme Court.* Application for writs denied. Dixon, J. dissents from refusal being of the opinion that the ordinance is clearly unconstitutionally vague and overbroad and is an unlawful restriction upon freedom of speech.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 21, 1971:	*Louisiana Supreme Court.* Defendant filed Notice of Appeal to the United States Supreme Court and a Request to Certify and Transmit the Record.
April 21, 1971:	*Criminal District Court.* Defendant filed Notice of Appeal to the United States Supreme Court and a Request to Certify and Transmit the Record.
June 7, 1971:	*United States Supreme Court.* Appeal docketed, No. 70-5373.
June 26, 1972:	*United States Supreme Court.* Judgment is vacated and the case is remanded to the Supreme Court of Louisiana for reconsideration in light of *Gooding* v. *Wilson.*
July 27, 1972:	*Louisiana Supreme Court.* Mandate of the United States Supreme Court filed.
October 11, 1972:	*Louisiana Supreme Court.* Joint stipulation to submit case on briefs without oral argument.
November 6, 1972:	*Louisiana Supreme Court.* Final judgment and opinion affirming the convictions and sentences of Mallie Lewis. Justices Barham, Dixon, and Tate dissenting.
January 31, 1973:	*Louisiana Supreme Court.* Defendant filed Notice of Appeal to the United States Supreme Court.
February 1, 1973:	*Criminal District Court.* Defendant filed Notice of Appeal to the United States Supreme Court.
February 5, 1973:	*United States Supreme Court.* Appeal docketed, No. 72-615.
June 4, 1973:	*United States Supreme Court.* Probable jurisdiction noted.

MUNICIPAL COURT
CITY OF NEW ORLEANS

No. 110-895(A)

CITY OF NEW ORLEANS

v.

MALLIE LEWIS

AFFIDAVIT CHARGING MALLIE LEWIS WITH REVILING THE POLICE, JANUARY 3, 1970

STATE OF LOUISIANA
PARISH OF ORLEANS
CITY OF NEW ORLEANS

No. 007097
AFFIDAVIT/SUMMONS
Item No. A-2292-70

In the Municipal Court of the City of New Orleans, Louisiana the undersigned affiant
Police P. Berner Arrest Officer(s) _____
(print name)
Credit 307 Being duly sworn upon his oath states:

That on Sat the 3 day of January, 1970 at or about 6:00 PM.

Name Mallie Lewis (Defendant)
Residence 5515 Lafaye Street
Employer's Name & Address _____

City & State N. O., La.
Birthdate 8-18-26 Race C Sex F Age 43

Location of Violation Curie and Leon C. Simon District & Zone 3-R Located within the City of New Orleans, did then and there commit the following offense in violation of Ordinance No. 828 M.C.S., known as the Code of the City of New Orleans of 1956, as amended,

Section ——— or Ordinance No. 49-7 Section ———
Relative To:

Reviling the Police

Affiant avers that he has reasonable grounds to believe and does believe that the person named above committed the offense set forth contrary to the form of the Ordinance of the City of New Orleans, Louisiana in such case made and provided and against the peace and dignity of the same.

/s/ P. L. Berner, Jr. Badge No. 1212
Signature of Affiant

Sworn to and subscribed before me:

1-3-70 /s/ D. Sgt. Boudreaux
Police Supervisor

Date of Trial: 1-5-70 Time: 4:00 PM

SUMMONS

You, Mallie Lewis defendant are hereby ordered to appear personally before Division C of the Municipal Court, 727 S. Broad, on January 5, 1970, at 4:00 PM., without fail under penalty of fine and imprisonment

/s/ P. L. Berner, Jr. 1212
Police Officer Badge No.

Affidavit Charging Mallie Lewis With Resisting Arrest, January 3, 1970

STATE OF LOUISIANA PARISH OF ORLEANS
SECTION C

MUNICIPAL COURT

AFFIDAVIT

Item No. A-2292-70

Car No. 307 District 3 Zone R Arrest Credit #

BEFORE ME, the undersigned authority at
730 So. White
Location where sworn

New Orleans, Louisiana, personally came and appeared Police Officer Paul Berner Badge No. 1212 who, first being duly sworn, did depose and say that he has reasonable grounds to believe and does believe that on Saturday, the 3 day of January 1970 at or about 6:00 PM. Mallie Lewis defendant, who gave his name above and his birthdate 8-18-26 Race C Sex F Age 43 and his Address 5515 Lafaye Street and his employment Housewife Did at Curie & Leon C. Simon Located in the City of New Orleans, Parish of Orleans State of Louisiana, then and there wantonly and unlawfully violate Ordinance No. ———— of the Laws and Code of the City of New Orleans of 1956, as amended Section 49-2 Paragraph ————, relative to
Resisting Arrest
All against the peace and dignity of same

/s/ P. L. Berner, Jr.
Affiant's Signature

Sworn to and subscribed before me on the 3 day of January, 1970.

/s/ D. Sgt. Boudreaux
Police Supervisor

Judge ————————————————

SUMMONS

Therefore, you, the accused

Mallie Lewis

are hereby notified and summoned by the authority vested in the undersigned police officer to personally appear before Section "C" of the Municipal Court of New Orleans, La., 727 S. Broad St. on the 5 day of January 1970 at 4:00 PM. to be arraigned without fail; otherwise a warrant for your arrest may be sought all according to law, particularly L.S.A.C.CR.P. Art. 211.

/s/ P. L. Berner, Jr. Badge No. 1212
Police Officer

ORDINANCE 828 M.C.S. 49-7 (REVILING THE POLICE)

Section 49-7. *Cursing, etc., police prohibited.*

It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty. (Flynn's Digest 1896, art. 1363.)

* * * [Certificate Omitted in Printing] * * *

ORDINANCE 828 M.C.S. 49-2 (RESISTING ARREST)

Section 49-2. *Resistance unlawful.*

It shall be unlawful for any person, by word or action, to resist an officer or to incite, induce, suggest or otherwise persuade or attempt to persuade any person to resist an officer. (C.C.S., Ord. No. 18,142, § 2.)

* * * [Certificate Omitted in Printing] * * *

TRIAL TRANSCRIPT, APRIL 17, 1970

"MUNICIPAL COURT FOR THE CITY OF NEW ORLEANS"

* * * [Caption Omitted in Printing] * * *

Witnesses for the City: Patn. P. Berner
Patn. L. Sunseri
Witness for the defense: Joseph Lewis, Sr.
Attorney for defendant: Mr. Barry J. Portman

* * * *

Attorney for the City: Mr. Clayton J. Borne

* * * *

[Tr. 1] *Officer Paul Berner, witness for the City, duly sworn, testified:*

Atty. Borne:

Q. State your name.
A. Officer Paul Berner.
Q. Who are you employed by?
A. New Orleans Police Department.
Q. Did you have occasion on the third day of January 1970 to issue a citation to one Mallie Lewis and Joseph Lewis, Sr?
A. I did.
Q. Are these the two people before the bar?
A. Yes sir.
Q. Did this arrest take place in the City of New Orleans?
A. Yes sir.
Q. Tell the court the circumstances leading up to the issuance of these citations.
A. The time and date specified on the affidavits while cruising I observed in my rear view mirror of my car a truck apparently following me through the streets of New Orleans. I began to make several turns and went around the block but I kept the truck in view. Every time I made a turn this truck made one in an apparent attempt to follow me. I continued on my way and went to a parking lot and the truck continued instead of coming

into the parking lot. I back out and followed the truck and pulled him over at New York and Curie. I put it over the air I stopped this truck that was apparently following me.

Q. You put it on the air?

A. Yes sir over the police radio. I said I was getting out to talk to the people in the car. I got out and the driver got out the truck.

[Tr. 2] *Atty. Borne:*

Q. Which one?

A. The male defendant was the driver. We started walking toward each other and when we got close I asked the driver why he was following me. He said "what did you do then with my son." I said I didn't have his son. I asked him if he had a driver's license and to let me see it. I started looking and it was dark and he was using my headlights looking for his license. While doing that, the female defendant (who previously was in the truck) she came out and started yelling and screaming that I had her son or did something to her son and she wanted to know where he was. I said "lady I don't have your son and I am not talking to you. I am talking to this man and you can go sit in the truck." She said "you god damn m. f. police—I am going to Giarrusso to see about this." I said "lady you are going to jail—you are under arrest." She said "you're not taking me to jail" and she started to get back in the cab of the truck and I caught up to her while she was getting in the cab. I attempted to take her and she started fighting and swinging her arms.

Q. You had trouble subduing her?

A. Definitely. The fight continued and I got a hold on her. At this time the male defendant came across my back and I was struggling with both subjects. Officer Sunseri came over and removed the male from my back and the fight was over. The subjects were placed in the car and charged accordingly.

[Tr. 3] *Atty. Borne:*

Q. You mentioned she asked where her son was. Had you ever seen this truck and these people previous to this?

A. Yes sir I had.

Q. What were the circumstances about her son?

A. I saw the truck at the fire station at Franklin and Mendez Streets. The circumstances involving her son were with another officer when he put her son under arrest because he was wanted under a capius from Civil District Court.

Court:

Q. You had nothing to do with it?

A. No. I had nothing to do with it aside from the fact I helped the man with the paper work at the scene. He wasn't sure what to do.

Q. It wasn't your arrest?

A. No sir it wasn't.

Q. You can identify those two people as the parties you issued the citation to on that day?

A. Yes sir.

Atty. Portman:

Q. How long have you been employed by the New Orleans Police Department?

A. A little over three years.

Q. In that time have you ever been the subject of a complaint by a citizen?

Court:

That has nothing to do with this.

Atty. Portman:

It has something to do with it.

[Tr. 4] *Court:*

What?

Atty. Portman:

A continuous line of conduct.

Court:

That has nothing to do with this case. He didn't even arrest her son.

Atty. Portman:

The testimony showed he had something to do with the arrest. That was the reason why I asked this question. It is very clearly connected by the fact we have an affidavit here and the defendants are in court.

Court:

I don't agree with you.

Atty. Portman:

Each defendant will show Officer Brener conducted himself in a manner which was not only unconventional but quite possibly illegal. The defendants would like to show by his testimony his conduct at the place of arrest and his conduct with the defendants. I would like to show this by question and testimony of the officer.

Court:

You will have to show it.

Atty. Portman:

I reserve the question.

Court:

This is what we are talking about right now. It wouldn't matter if he made 1500 illegal arrests as long as this one is legal.

[Tr. 5] *Atty. Portman:*

Q. Are you aware an administrative complaint was filed with Supt. Giarrusso concerning your conduct?
A. I am well aware of it.
Q. What was the reason?
A. I don't have the slightest idea the last I heard of it. I made a statement.

Atty. Borne:

That has no regard to this case.

Atty. Portman:

I clearly has regard to this case.

Court:

I am not trying that.

Atty. Portman:

Q. I have your affidavits with regard to the defendants and as far as Mallie Lewis and the location and street number of the arrest—Curie and Leon C. Simon. With regard to the affidavit on the defendant Joseph Lewis, Sr. the location of the arrest is Curie and Pasteur. Can you explain the discrepancy?

A. I have to look at the affidavits. This is strictly a mistake on my part. It should have been Curier and New York. It runs about a half block off Leon C. Simon. I thought it was still Leon C. Simon.

Atty. Portman:

I would like to move that the affidavit be stricken. It doesn't conform to the testimony and sworn statement of the officer. It doesn't conform to the affidavit sworn to and issued by him.

[Tr. 6] *Atty. Borne:*

The city objects and moves to amend which it has a right to do.

Atty. Portman:

Q. You testified that you had been at the scene of the arrest of the son of the defendants. Is that correct?

A. Yes sir.

Q. Where was that arrest made?

A. The arrest was made to the best I can remember in the 2600 or 2700 block of Prentiss.

Court:

The officer already testified he didn't have anything to do with it. He was just helping write a report. This is not the subject before the court. There is no necessity to build up a record.

Atty. Portman:

I would like to tell the court why. The reason I am bringing this line of questioning is that the defendants

will show by the testimony that Officer Brener gave the defendants permission to follow the police car to central lockup and because he refused or the other officer making the arrest of the son refused to tell them why their son was being arrested.

Court:

He didn't have anything to do with it. We are not trying that. He didn't accuse them of a violation by following—the thing I understand before the court is that she reviled the police and resisted arrest.

Atty. Portman:

I would like to reserve the right to call Officer Brener to the stand when the defendants present their case in chief. We are going through cross-examination now.

[Tr. 7] *Court:*

It has nothing to do with this case.

Atty. Portman:

It is relevant.

Court:

What difference does it make. She is charged with doing something she did when she met him.

Atty. Portman:

In order to resist arrest it must be a lawful arrest.

Court:

She reviled the police. That's what the arrest is based on. Under resisting arrest and reviling the statute states the officer should be acting in the performance of his duty. The defendant contends the officer was not acting in the performance of his duty.

Court:

Will you tell me what he was doing if not his duty?

Atty. Portman:

I will show by testimony and laying a predicate for

my questions by asking the officer about his prior activity with the defendants.

Court:

He didn't have any.

Atty. Portman:

You didn't give me a chance.

Court:

If you can prove it and tell me the truth you would have to tell me he had something to do with the defendants. He was by himself riding in a car. How could he?

[Tr. 8] *Atty. Portman:*

He stated he was at the scene. That showed he knew the defendants prior to the time he arrested them. May I continue?

Court:

No. I don't follow that. I am trying to get at this point now. If you can tell me what it is going to lead to where he makes or doesn't make a legal arrest I am interested.

Atty. Portman:

He didn't make a legal arrest. I am trying to show the reason by the defendants who were at the particular place they were arrested and the reason why they were stopped. The defendants were acting according to police instructions. Officer Brener has knowledge of that fact.

Court:

I don't want to deny you of anything I just can't see the connection.

Atty. Portman:

Q. What time did Officer Brener—

Court:

That's immaterial. Do you want to know whether or

not he knew anything about their son's arrest? Is that the question.

Atty. Portman:

It's not immaterial. The testimony will show their son was held in a police car on the street for an hour and a half.

Court:

He didn't hold him.

[Tr. 9] *Atty. Portman:*

He was part of a group.

Court:

We are getting so far away from this case. I don't see any sense in it.

Atty. Portman:

May I call Officer Brener as a witness after the defendants testify. Perhaps you can see it clearer at that time.

Court:

I won't let anyone else testify about the son. That is one incident and we are trying another incident.

Atty. Portman:

They are related. I want to show it by my questioning.

Court:

We will concede there was a prior incident. These people were told to follow that officer. You get your information from him. That is a fact I will concede. That doesn't give these people a right to revile him when they get to see him.

Atty. Portman:

I am not conceding the fact the defendants did revile the police.

Court:

I am trying to decide that.

Atty. Portman:

Under unlawful arrests, City of Monroe vs. Dugas R.S. 14 we have clear law—reasonable resistance to an unlawful arrest by person or persons arrested. There is a case as to the husband helping him wife. There can be no lawful charge of resisting arrest if the arrest was unlawful.

[Tr. 10] *Court:*

Prove the person didn't revile the police. That's the whole case.

Atty. Portman:

It is not necessary to show the defendant did not.

Court:

How can you not show it and say it wasn't a lawful arrest.

Atty. Portman:

In order to be arrested you must show probably cause for a felony.

Court:

Not necessarily a felony—a misdemeanor.

Atty. Portman:

The officer didn't testify to a misdemeanor.

Court:

He was reviled and called names when he said he didn't know about her son and she said he wouldn't tell her.

Atty. Portman:

He didn't state any misdemeanor. It was the defendant's truck that was stopped.

Court:

He didn't arrest him for a traffic violation. He arrested him for what happened after—why someone was

following him around and anyone has a right to know that.

Atty. Portman:

The testimony I am going to try to get from the officer is why they were following him around.

[Tr. 11] *Court:*

It doesn't make any difference. They didn't do anything by following him around but the question is he stopped them to find out what they wanted. Then they committed the offense he alleged.

Atty. Portman:

The testimony will show there was no necessity for the officer stopping the defendant's car.

Court:

Why not? How else were they going to communicate with each other? Continue with the case.

Atty. Portman:

Q. You say you first saw the defendant following you?
A. When I left the scene at the fire station helping the other officer with his paper work.
Q. I have here a city map and ask you to trace a line on the route you took.
A. I can't do that. I couldn't show the route I took by my automobile. This was in January.

Court:

Q. You admit the people caught up to you?
A. I pulled into a parking lot and allowed them to pass me up.

Atty. Portman:

They communicated previously.

Court:

You cannot say that they are trying to get in touch with him. He stopped them and the violation was committed in his presence according to his allegation.

Atty. Portman:

I reserve the right after you hear the testimony of the defendant to call Officer Brener back to the stand to question him as to prior circumstances.

[Tr. 12] *Court:*

If anything is warranted—yes.

Q. Then you made contact and they were apprehended at that particular place?

Atty. Portman:

I take an exception.

Q. For how many blocks approximately did the defendant follow you?

A. Approximately 15 blocks.

Q. How did you know they were following you?

A. I observed the headlights in my rear view mirror of my automobile and from the headlights it was apparent it was a pickup truck.

Q. How were you certain those headlights belonged to the defendant?

A. I am not certain. I stated I had a truck following me that would turn when I made a turn. At one time I would pull over to the side of the road and the truck pulled over and wouldn't pass me and wouldn't approach me.

Q. At what speed were you traveling?

A. Extremely slow.

Court:

I cannot possibly see any connection. What happened after they got together he told you.

Atty. Portman:

I take an exception to the ruling.

Court:

Q. You said you pulled into where?

A. A parking lot.

[Tr. 13] *Atty. Portman:*

Q. Did this belong to a particular business concern?

A. It was a parking lot for the Burger King.
Q. How long did you remain in the parking lot?
A. I pulled in and turned my car around and they passed and I pulled out. That's all I can tell you.
Q. Then what did you do?
A. I went after the car that was following me and stopped them.
Q. How many blocks from Burger King did you stop the car?
A. Approximately two.
Q. Why did you stop it?
A. To find out why they were following me.
Q. Is there a city ordinance against following a police officer?
A. No.
Q. Under what right of law did you stop the defendant?

Court:

That doesn't seem to the subject of this case.

Atty. Portman:

It is.

Court:

The subject is what took place as alleged in this affidavit.

Atty. Portman:

Following is not unlawful.

Court:

If someone is following you and you stop them to ask what they want that is the reason.

[Tr. 14] *Atty. Portman:*

Q. You stopped the car and you got out—is that correct?
A. Yes sir.
Q. Mr. Lewis got out of his?
A. Yes sir.
Q. What were your words to him?

A. I said "cap what are you doing following me." He said "I want to know what you did with my son." I said "I didn't have your son."

Q. What did you call him?

A. "Cap."

Q. Did you know him?

A. No I didn't.

Q. "Cap" is a familiar term?

A. A form of address.

Q. What manner of voice did you address Mr. Lewis?

A. What do you mean by manner of voice.

Q. Loud or what?

A. I don't think.

Q. Was it angry?

A. I don't think it was.

Q. Did you ask Mr. Lewis for his god damn driver's license. Did you use those particular words particularly the adjective modifying the noun.

A. I merely asked for his driver's license.

Q. You used no profanity?

A. Correct.

Q. You used no profanity in asking for that license?

A. No.

Q. Did you say "I'll teach you to follow cops all over the street?"

A. No.

[Tr. 15] *Atty. Portman:*

Q. There is nothing familiar to that?

A. No.

Q. Did Mr. Lewis say to you "you told me I could follow you to the central lockup?"

A. To the best of my knowledge I don't know.

Q. Do you recall anything familiar to that?

A. No.

Q. Did Mr. Lewis tell you what he wanted to do was find out where the officer took his son?

A. He got out the other side. He wanted to find out what they did with his son. I said I didn't have him.

Q. He said what you did or the other officer?

A. He used the word "I" did with his son. I said I didn't know.

Q. While waiting for Mr. Lewis' driver' license did you try to frisk him?

A. No.

Q. You didn't put him up against the truck?

A. No.

Q. You didn't check his pockets?

A. No indeed not.

Q. What were the first words Mrs. Lewis said to you?

A. He wanted to know what I did with his son.

Q. What did you reply to Mrs. Lewis?

A. To Mrs. Lewis?

Q. That was my question. I meant Mrs. Lewis?

A. I thought you said Mr. Lewis. You mean what she got out the truck?

[Tr. 16] *Atty. Portman:*

Q. That is right.

A. She was screaming and yelling something to the effect I had her boy and what I did with him. I said "lady I don't have your boy. I am talking to this man and you can go sit in the truck."

Q. You testified you grabbed her?

A. No sir.

Q. What did you do?

A. She did the next thing.

Q. What did she do?

A. She said "you g. d. m. f. police—I am going to see Giarrusso." I said "lady you are going to jail—you are under arrest." She tried to get in the truck. I ran around and attempted to get her out. Then the struggle started and during the struggle the male defendant jumped on my back and Officer Sunseri came to my assistance and it was over.

Q. Did you call her a black bitch or a black mother fucker?

A. No.

Q. You didn't call her that?

A. Definitely not.

Q. Did you use any profanity in talking with Mrs. Lewis?

A. No.

Q. Did you ever use the word "nigger?"

A. No.

Q. Where did you grab Mrs. Lewis? How did you handle her?

A. I attempted to grab her by the arm, body or any way, shape or form to subdue her to remove her from the truck.

[Tr. 17] *Atty. Portman:*

Q. Did you put her arm behind her back in the standard police operating procedure?

A. I never used that hold in my life.

Q. You grabbed her around the neck?

A. I did try to grab her around the neck.

Q. Do you recognize this coat?

A. Not off hand.

Q. Did you recognize it now after looking at it?

A. Is there any reason I should recognize it? I don't.

Q. You testified Mrs. Lewis humped on your back. Did Mr. Lewis say anything to you when you grabbed his wife?

A. Not that I can remember.

Q. Do you recall him asking not to wrestle with his wife but he was a man and to wrestle with a man?

A. Not that I remember. I don't know what he said.

Q. Do you recall Mrs. Lewis saying to leave her husband alone because he just had a heart attack two days previous?

A. No.

Q. Do you recall Mr. Lewis saying to leave Mrs. Lewis alone and allow her to remain home to keep their three children?

A. I don't remember. I don't know whether Mr. Lewis said anything or not.

Q. Your testimony is that you never threw Mr. Lewis against the truck and searched him?

A. After he was arrested.

Q. When was he under arrest?

A. When he jumped on my back he was under arrest.

[Tr. 18] *Atty. Portman:*

Q. At what point did you put Mrs. Lewis under arrest?

A. When she resisted me.

Q. You stopped Mr. Lewis and asked for a driver's license and he was under arrest?

A. No.

Q. The reason you stopped him was because he was following you?

A. Yes sir. I wanted to find out what the man wanted.

Q. Was any other officer present?

A. At which time?

Q. At the time you grabbed Mrs. Lewis and arrested Mr. Lewis.

A. One other officer came to my assistance.

Q. What is his name?

A. Officer Sunseri.

Q. He was present at the time?

A. I don't know. When he got there all I know was he took Mr. Lewis off my back. Exactly what time he got there I cannot say.

Q. Did you say to Mrs. Lewis when she asked you to leave her husband alone because of his heart condition that he ought to die and you both are going to jail?

A. No.

Q. Did Mrs. Lewis tell you she didn't see anything like this in her life and she was going to report you to Supt. Giarrusso?

A. She didn't tell me that.

Q. Didn't you tell her to shut up and used the words "black bitch and mother fucker" and at that time she said she would report you to Supt. Giarrusso?

A. No.

[Tr. 19] *Atty. Portman:*

Q. You are aware now that Mrs. Lewis did file a complaint with the Superintendant?

A. Perfectly aware. It isn't a hard procedure to do.

Atty. Portman:

No further questions.

* * * *

Patn. L. Sunseri, witness for the City, duly sworn, testified:

Atty. Borne:

Q. Please state your name and by whom employed.

A. Patn. L. Sunseri, New Orleans Police Department.

Q. On the third day of January 1970 did you receive a call over the police radio for assistance from Officer Berner?

A. I did, yes sir.

Q. Tell the court what was the nature of the call and what were the circumstances when you did arrive on the scene.

A. To start out—the call was received he was being followed by a truck. Officer Berner was riding a one man police car.

Atty. Portman:

That is hearsay testimony.

Court:

What is?

Atty. Portman:

What Officer Berner was saying.

Court:

Q. You went to Officer Berner's assistance?

A. Yes sir on the radio call.

[Tr. 20] *Court:* Q. What happened?

A. I pulled the car up there and observed the two subjects before the bar standing by the truck. Officer Berner was talking to the colored female at which time I had my door closed and could not hear. I saw him grab her. A few minutes later the colored male went around the truck and grabbed Officer Berner around the neck. I put it over the radio and called for assistance and I jumped out and grabbed the colored male and pulled him off Officer Brener's neck. I took subjects to Officer Brener's police car.

Q. Did you at any time hear Officer Berner use obscene language to the two defendants befor the bar?

A. I did not.

Q. When Officer Berner tried to subdue the female defendant before the bar did he have trouble doing so?

A. Yes sir he did. He was struggling with her.

Court:

It would be a conclusion. He was just trying to arrest the defendant and when you arrived there then there was a struggle and the male defendant jumped on Officer

Q. Did you find out why he had trouble?

A. He went around the truck and jumped on Officer Berner's back.

Atty. Portman:

Q. You said he jumped on his back—what do you mean by jumping?

A. The fact is he grabbed Officer Berner around the neck and overpowered him.

[Tr. 21] *Atty. Portman:*

Q. He brought him to the car?

A. I didn't say that.

Q. What did he do to overpower him?

A. Officer Berner looked like a piece of ham between two pieces of bread. That's about the size of these two people.

Court:

Q. You stopped him from doing what he was doing?

A. Yes sir.

Atty. Portman:

Q. You didn't hear the conversation between Officer Berner and the defendant prior to the time you saw Officer Berner grab Mrs. Lewis, is that correct?

A. Correct.

Q. Will you testify you did not hear Mrs. Lewis say she would report this incident to Supt. Giarrusso?

A. I don't recall her saying that.

Q. You don't recall anything?

A. I was sitting in my police car with the door closed waiting for the radio to clear to let them know where I was. At the time they were struggling.

Q. When you got out the car what did Mrs. Lewis say?

A. I don't know what she said.

Q. Do you recall what Mr. Lewis said?

A. No.

Q. You have no recollection of all the words that were used?

A. No I don't.

Atty. Portman:

I would like to ask for a directed judgment of acquittal on the grounds I mentioned before that there is no showing by the testimony of the officer

[Tr. 22] *Atty. Portman:*

of a lawful arrest. The testimony of Officer Berner is that the defendant's truck was stopped for no violation or crime or cause or felony committed in his presence. I refer to the Miranda and Saia cases and in this instance Mr. Lewis was asked for his driver's license, stopped by the officer and this was the point of arrest.

Court:

At the present time I feel I should dismiss the affidavit against Joseph Lewis on a technicality because it was impossible to be in the position cited in the affidavits as the two streets run parallel. It's purely on technicality. As far as Mrs. Lewis I will deny it.

Atty. Portman:

I will take an exception to Mrs. Lewis.

Court:

Officer Berner was being sought by these people because in their belief he knew something about this.

Atty. Portman:

I take an exception to the ruling.

* * * *

Joseph Lewis, Sr. (former defendant dismissed and now testifying in behalf of Mrs. Lewis, his wife, being duly sworn, testified:

Atty. Portman:

Q. State your name and home address.
A. Joseph Lewis, Sr., 5515 Lafaye Street.

[Tr. 23] *Atty. Portman:*

Q. On January 3 were you in a truck with your wife late that evening?
A. I was.
Q. Is that your own truck?
A. My own truck.
Q. Do you have a valid operator's license for driving in the State of Louisiana?
A. Yes sir.
Q. Tell the court why you were in the truck that afternoon.
A. I was going to the bakery and some officer came back with one of my little boys in the car and I ran back and stopped and asked what for. He had the little girl and the other little boy and I said to turn them loose because he didn't have no business with them. Officer Berner was there. I asked why for Joseph and they said "if you want to find out follow us to the central lockup." I sat by the fire station from 4:00 o'clock to quarter to six. I sat there and sent the other child home to get my wife. Joseph said "daddy don't leave me they said they are going to beat me." I said that I would go to the central lockup so I sat by the fire station on Franklin. Officer Berner said to move on or you will go to jail. I told him if I moved from there I would go to the other side. I went to the other side of Franklin. Then about 6:00 o'clock they pulled out. One officer had Joseph and he pulled out. Officer Berner got behind and drove 15 miles an hour and I could not

[Tr. 24] *Joseph Lewis, Sr. continued:*

pass him. He got to Elysian Fields and turned up and I turned up. They had Joseph in a car going to the

lake. I got to New York Street and list them. I went out there and he was in the Burger King. He pulled out and I stopped and he turned his light.

Atty. Portman:

Q. You saw Officer Berner turn and pull in the Burger King? What did you do?

A. I was going toward New York.

Q. He disappeared?

A. Yes sir. The light caught me and that was what made me turn off after that. So my wife said "it looks like him and she said don't run." I said I didn't have to run because there was nothing to run about. I stopped and he got out the car and said "let me see your god damned license. I'll show you that you can't follow the police all over the streets." I said I would show him my license. He was cursing me.

Q. What were the words?

A. Black son of a bitch and he said he would show me about following the police all over the god damned street. I said I wasn't following him and he pushed me by the car and he gave me my license and he patted me down. I put my wallet on top of the car.

Q. Did your wife get out when you were pushed against the car or did she stay in the truck?

A. After that she got out and said "Officer I want to find out about my son." He said "you get in the car woman. Get your black ass in the god damned car or I will show you something." She said she just wanted to find out and he yelled and screamed

[Tr. 25] *Joseph Lewis, Sr. continued:*

and said "you black son of a bitch I was telling you to get back in the car." He grabbed her and said "you black son of a bitch you are going to jail." I said officer don't hurt my wife. I am a man—don't put her in jail. I have three children—let her go home. He said we both were going to jail. I asked what for because we didn't do nothing. Then he said "you black son of a bitch, you are going to jail." He called my wife a black bitch and my wife said "you are another black bitch" and then two

more officers came and I didn't put my arm around his neck. I just held him and said not to scuffle with my wife. My wife said I had a heart attack and he said "you ought to die you black mother fucker."

Q. Was that addressed to you?

A. He said I ought to die.

Q. Did you ever touch Officer Berner?

A. Just put my hand on him like trying to explain.

Q. At what point?

A. He had her around the neck and I was scuffling trying to get his hands from around her neck.

Q. Do you recognize this coat?

A. Yes.

Q. Do you recognize this rip?

A. Yes.

Q. Do you know how it happened?

A. He grabbed her.

Q. Who is he?

A. Officer Berner tried to bend her hand behind her back and grabbed her by the coat. He dragged her to the car and she said "you don't have to drag me I didn't do no violation."

[Tr. 26] *Atty. Portman:*

Q. Do you recall your wife saying anything about filing a complaint with Supt. Giarrusso?

A. She said if I can't ask you I will ask Supt. Giarrusso.

Q. Do you recall your wife using any profanity?

A. He didn't curse except when he called her a black bitch and she said he was another one.

Q. Did you at any time Mr. Lewis on this date or did your wife refuse to follow the instructions of Officer Berner?

A. No.

Q. You tried to show your license?

A. I put my wallet on top of the car.

Q. The officer did what at this point?

A. He called me a black mother fucker and shoved me against the car and searched me down.

Q. Did your wife at any time attempt to resist the officer?

A. She did not.

Q. Your testimony was that the officer said to get back in the car?

A. In the truck.

Q. She was attempting to do so and he grabbed her?

A. She put her foot on the running board and he grabbed her.

Q. You testified you were in the hospital. How many days prior to this had you been released from the hospital?

A. I had been released two days.

Q. Why were you in the hospital?

A. Something about my heart. I stayed seven days.

[Tr. 27] *Atty. Portman:*

Q. Was your wife brought to the hospital after this altercation with Officer Berner?

A. For her back.

Q. Do you know your wife to be a religious woman?

A. Yes sir.

Q. Does she customarily use profanity?

A. She doesn't curse.

Q. Has your wife ever been arrested except for traffic violations?

A. No sir.

Atty. Borne:

Q. Did you say or did you not say that you were following Officer Berner's car—you were or you were not?

A. We were.

Q. Did you know for a fact that your son was in Officer Berner's car?

A. I didn't know it. He wasn't in his car.

Q. Which car was he in?

A. He was in that other car. I forget his name.

Q. Where did they tell you they were taking your son?

A. To central lockup.

Q. Do you know where it is?

A. Yes sir.

Q. Where is it?

A. This is it here.

Q. In back of the courthouse here?
A. Yes sir.
Q. When Officer Berner pulled your car over he did ask you for your license?
A. Yes. I said yes and I showed him.

[Tr. 28] *Atty. Borne:*

Q. What did you tell him?
A. Why was he putting me in jail—why was he arresting me.
Q. He stopped your car and threatened to arrest you?
A. He didn't say what he would do. He said he would show me about following police officers.
Q. You just stated he asked for your driver's license?
A. Yes.
Q. Did he ask why you were following him?
A. He didn't.
Q. He didn't ask you why you were following him?
A. No sir he didn't.
Q. If I tell you there was testimony to that effect—that you did or he did ask why you were following him—what about that?
A. He said he would show me what I am following him for. She said he will show me about following police officers.
Q. After what time did your wife get out the truck—how much of a period after the truck was stopped did your wife get out?
A. I will say about two minutes. We sat there two or three minutes inside the truck while he raised so much sand when she told him I wanted to find out about my son.
Q. Did you hear any conversation between your wife and Officer Berner at the time?
A. Yes sir.
Q. What did your wife say?
A. She wanted to find out about our son. He said "I'm not talking to you. Get back in the truck."

[Tr. 29] *Atty. Borne:*

Q. You didn't hear your wife use profanity?

A. He called her a black bitch while we were in the car and she said he was another one.

Q. What did she do after he said to come back in the car?

A. She started back to get back in the car and he grabbed her.

Q. Did you hear Officer Berner place your wife under arrest?

A. He said she was going to jail.

Q. When Officer Berner tried to subdue your wife did he have any trouble?

A. No she tried to get his hand off her neck from pulling her.

Q. Did the other police officer come to the aid of Officer Berner when you jumped on his back?

A. I didn't jump on his back.

Q. Where were you?

A. Trying to pull my hand away during the scuffle.

Q. How did the officer get you to grab you if you were trying to break it up?

A. He didn't brag me. There were as many of them got there ; ' you didn't know who was there.

Q. How many?

A. Five or six cars were there.

Q. Prior to this incident did you know Officer Berner?

A. Sure.

Q. Before that day?

A. I didn't see him.

Q. Is there any reason why Officer Berner should be vindictive against you and your wife?

A. I don't know. He said to follow him to the central lockup.

[Tr. 30] *Atty. Borne:*

Q. Do you feel it was Officer Berner or the police in general being aggressive against you?

Atty. Portman:

I object to that. It's irrelevant and I see no value to that. It's calling for a conclusion.

Court:

No more irrelevant than any other question. He is establishing something in your favor. He has no reason to believe Officer Berner is prejudiced against him.

Atty. Borne:

There was something previous I was trying to find out. That was the object of my question. His answer was no and therefore I have no reason to believe he was vindictive against these people.

* * * *

Mallie Lewis, defendant, duly sworn, testified:

Atty. Portman:

Q. What is your name and address?

A. Mallie Lewis, 5515 Lafaye Street.

Q. Would you state where you were on the evening of January 3, 1970?

A. I was in my kitchen finishing cooking around 4:30 and my son 19 and my son 8 were standing on Prentiss between Lafaye and Baccich and my son 8 came running home and said "Mama they arrested Jo'Jo, my son 19. My daughter 12 was home and I made her go see why they had him because I could not come right now. She went down there and they stayed so long I came out to the front door and I saw a neighbor of mine and he said "do you know what happened down the street—and I said "no." So I sent my daughter.

[Tr. 31] *Mallie Lewis, continued:*

He said they arrested a girl and put her in the car. I said no I just sent her down there and he said did she have on a red dress. I said yes and he said they put her in the car. I said that my husband just went down the street and I hope he already saw it. He said my husband was there and that he was coming back because he didn't think it was that much. I came back in to feed my baby around 5:30 and my daughter came in crying. I asked what was wrong she stayed so long. She said the police had her dragging her by the back

of her neck and by her dress and they were hitting her in the stomach.

Q. Your daughter said this?

A. Yes sir.

Q. How old was she?

A. Twelve. She made thirteen the first of last month. In a few minutes I said "where is your daddy: and he came in the front door. He said "put on something." I said "I won't put on anything except my coat." He said Jo-Jo said not to leave them because they were going to whip him. I said from 4:30 to now what are they doing around there because it's not that far to central lockup. I put on my coat and we get in the truck. They were on Franklin at the fire station. They had my son but he wasn't in Officer Berner's car. He was in the car and if he didn't have anything to do with it he was sure officiating and doing everything. I went to the car and asked my son what he did and he said nothing—he was just skating. I asked him if he was sure and he said there were other boys but they didn't catch them. I asked why he said

[Tr. 32] *Mallie Lewis, continued:*

I asked why he said they would beat him and he said he didn't know why but they would beat him. I went to the truck and what he told my husband I don't know.

Atty. Portman:

Q. Officer Berner?

A. Yes sir. I didn't see anyone else. The officer who had my son was in the car. The car my son was in was behind Officer Berner's car. The officer had my son in a car in the fire station. He had such a nasty attitude I didn't tell him anything. My husband said they didn't want me to stay over there. I said go on the other side of Franklin. Why were they holding him for two hours? They didn't have no business to arrest him and hold him that long. When they pulled off Officer Berner let the car my son was in get around him and then go ahead. He got in the middle of the street between us and the car my son was in and drove fifteen

miles per hour and kept us from passing him. We lost the car and went fifteen blocks and I told him I knew he was going to try to do that. He wouldn't have gotten in front of us that way if he wasn't trying to throw us off the trail. I said come on and we will go around to central lockup. The light caught us at Franklin and Robert E. Lee and he was ahead of us a good ¾ of a car length and the red light caught us and that made him disappear. I didn't care because he didn't have my son in that car. We were not looking for him but he was officiating. We turned off on New York to turn back and I said we will go to central lockup. Then we saw him.

[Tr. 33] *Atty. Portman:*

Q. You were on your way to central lockup?

A. Yes sir. I don't know where they disappeared to. I wasn't worried about it being lost because it wasn't the car my son was in. It doesn't take no two hours when someone is arrested and going to central lockup doesn't take that long. We passed Burger King and I saw the car. He pulled up and backed up in Burger King. I said to go on as if you don't see him and he won't have any chance to do anything and we will report it. He stopped us after we got to Pasteur and Cameron Boulevard. New York was right into Pasteur and Pasteur runs into Curier. At that intersection be blows his siren. We didn't stop so he blew it. I told my husband to stop because it looked like he was after us. He put that siren on and came about 50 miles an hour from that little distance. My husband got out. I went there after he grabbed him and snatched him around and I got in trouble. He said "give me your so and so license." The attitude he had I told him he didn't act like an officer. Anything I asked him—well I am a Christian woman and I don't use profane words like he was saying. I didn't tell him one word. I said "Officer I want to know where they are taking my son." I know they take boys back there and beat them. Sometime they don't come out of it. He cursed me and said to get back in the god damned car and he was screaming someone was drunk or something. He said to get in the car. I said if I wasn't

going to get information from him and the other officer I was going to Giarrusso. He said if you don't get in the car god damn it I will take you to jail. He didn't answer my question.

[Tr. 34] *Mallie Lewis, continued:*

He was just srceaming and yelling like I did him something. I said I will get in the truck but I am going to Giarrusso tonight. He said "you are going to jail tonight." I went to put my feet on the running board and he grabbed me by my neck. We went to the car with his hand on my neck. He said "I am not here for no playing or foolishness."

Atty. Portman:

Q. Is this your coat? Can you identify it?
A. Yes.
Q. Is it ripped here?
A. Yes sir. After the struggle he grabbed me just like this and shoved me the car and tore my coat.
Q. You went to the hospital?
A. Yes.
Q. Is this a hospital report on you?
A. Yes it is.

Atty. Borne:

I object to the offer of this into evidence. The writing is not the same in the entire report.

Court:

I don't see where it has anything to do with this.

Atty. Borne:

Some of the facts in this case are placed into this report.

Atty. Portman:

One is a laboratory finding and one the nurses' remarks.

Court:

It's not relevant to what happened here. We are not trying to find something that happened a day or so after.

[Tr. 35] *Atty. Portman:*

I am submitting it for the purpose of showing a scuffle and the injuries caused to her.

Court:

It's not part of this.

Atty. Portman:

It's the res geste of the incident.

Court:

It's admitted there was a struggle.

Atty. Portman:

I take an exception.

Court:

To what? You offered it in evidence.

Atty. Borne:

I object. It's irrelevant. There is no authority for its authenticity and the handwriting is different on the report.

Court:

It's irrelevant. It has nothing to do with the charge we are considering. It might be relevant to something else—not this.

Atty. Portman:

I take an exception.

Q. At this point the officer grabbed you?

A. Behind my neck. He pulled my arm behind me like this and then braced himself against me. He was going to drag me to the car and I said I would not let him drag me to the car.

Q. You shoved him away?

A. Yes. My husband come and he said "don't wrestle with her, do it with me— I m a man."

[Tr. 36] *Mallie Lewis, conti d:*

He was cursing all the time in a very nasty attitude.

Atty. Portman:

Q. Did he call you a black bitch?

A. About eight or nine cars of police same then. He called them when he was in the parking lot. Then while we were scuffling eight or nine cars of police came and as I looked around one had a billy stick going to hit me and when I turned around he eased it down. After they came he started cursing. Everyone came out the house. This was on Cameron.

Q. It's a white neighborhood?

A. Yes sir. Before they got in close enough to see anything they all looked in the car and I asked how I looked to them putting a flashlight in my face. I said "how do I look to you." By husband said "I don't see what you have us in this car for. We didn't do anything. We told you we wanted to see my son because we didn't want you to beat him." Then he told him that we have two little chilfdren at home—a boy and a daughter. My husband said to let me go back and he said he was out the hospital two days with his heart. Then he said "you black mother fucker, you should die." That's the words he was using all the time. He said "you ought to be dead, shut up you black bitch, you black mother fucker." I said "you are another one." I don't use the words but he was there for all that. I wasn't out there for any boisterousness because you know you are supposed to give them a certain amount of honor.

[Tr. 37] *Atty. Portman:*

Q. Did you at any time other than the one incident when the officer called you a black mother fucker use any profanity toward the officer?

A. No. I didn't say a word after I told him what I was out there for. After that I didn't say one word and he reached his hand this way and put his arm around my neck. I didn't say another word.

Q. Up to the time the officer grabbed you by the neck were you following his truck and he told you to go back to the car?

A. He told me he was on this with my husband after I went around and snatched him around and said he was sick. I said he wanted to know where they were

taking my son. He said to get back in the god damned truck, woman. He was screaming. I said certainly I would get back in the truck but what was this. I never seen nothing like this before in my life—just coming to ask the officer for information. I said I would go to Giarrusso. He said to get back in the god damn truck now or else you will go to jail. I told him I would go to Giarrusso tonight and he said I was going to jail. He didn't get the driver's license—he grabbed me by the neck so I put my feet on the running board.

Q. You were trying to get in the car as the officer told you and he pulled you out?

A. Yes sir.

Atty. Borne:

Q. Were you driving?

A. No.

[Tr. 38] *Atty. Borne:*

Q. Your husband was?

A. Yes. My son was sitting in the car behind Officer Berner's car.

Q. I am not talking about that.

A. I am telling you. That is why we were following.

Q. You were following Officer Berner?

A. Him and whoever had my son. This officer had my son and he got in before him. We were behind the car with my son. He parked on the side to let the car with my son ahead of him and he got by us. We weren't following Officer Berner.

Q. Your husband testified he was following Officer Berner.

A. The reason we were following was we were following the car with my son.

Q. When Officer Berner stopped your husband he got out the truck?

A. Yes.

Q. Why did you get out?

A. After he pushed him against the car.

Q. The officer said to get out?

A. No. He got out.

Q. The officer cursed you merely because you asked where your son was?

A. He most certainly did. He knows that.

Q. That is the only reason he did what you alleged he did?

A. Yer he did it what he did. He knows that. He is well aware of it. I told him about it.

Q. It's hard for me to understand that.

A. He knows it.

[Tr. 39] *Atty. Borne:*

Q. Why did you get out the car?

A. I had a reason. My husband just got out the hospital two days ago. I asked the officer where he took my son.

Q. Did you use any profanity?

A. Not until we were placed in the car and he called me a black bitch.

Q. There's no reason why Officer Berner would lie and say you used profane language is there?

A. I don't know. He did a lot that night. He knows why. I don't know why.

Q. Did you resist him at all?

A. I didn't resist.

Court:

He said you did. He said you wouldn't let him put you in the car.

A. I didn't give any resistance. I wouldn't let him drag me to the truck.

Atty. Borne:

Q. You didn't resist him?

A. No. Why I did that he didn't have no business grabbing me.

Q. If you did it?

A. I did it yes to defend myself.

Q. Before this date did you know Officer Berner?

A. I didn't know nothing about him.

Court:

Q. You knew where they were taking your son. How many blocks did you follow Officer Berner's car?

A. Maybe eight or nine blocks.

[Tr. 40] *Court:*

Q. You could not have turned off?

A. We weren't following him.

Q. You knew where the other car was going—you weren't interested in Officer Berner?

A. We could not turn.

Q. In eight blocks you could not turn?

A. We didn't see it. After we got to Elysian Fields I told my husband to turn off. He wasn't interested in the car in front of us with my son in it. We weren't following him. The car we were interested in was the car with my son. He was officiating the whole thing with the other policeman who had my son in the car.

Atty. Portman:

Q. Three cars were leaving the scene of the arrest?

A. Right.

Q. The first car was your son?

A. No Officer Berner was the first car and my son was second and we were third.

Q. What happened to the car your son was it?

A. I don't know where it went. Officer Berner got on the side and stood there until the car carrying my son passed and then he pulled over.

Q. At that point what was the car your son was in doing?

A. Officer Berner was first then my son and us.

Q. After that Officer Berner got between the two?

A. Yes.

Q. Could you see when Officer Berner got in front of you where the first car with your son was?

A. I could not see it. I know he was only driving about 15 miles an hour ahead of us.

[Tr. 41] *Atty. Portman:*

Q. Why didn't you go directly to central lockup? Why did you follow your son?

A. He said they were going to beat him. It was two hours from the time of arrest and the time it happened. Why didn't they take him to the lockup first.

Q. When Officer Berner pulled off to the side of the road by the Burger King did you stop there and wait until he pulled out?

A. I was going to central lockup and if my son wasn't there I was going to report it. I told my husband to go on. He already made us lose the car he was in. Before they did anything to him I was going to central lockup and report it if he wasn't there.

Q. When Officer Berner grabbed you around the neck what did you do—try to get his hand off?

A. Yes I did.

Q. Did you do anything else beside defend yourself?

A. No.

Q. Did you strike him in the face?

A. I didn't do anything. I just pulled his hand off my neck.

Atty. Portman:

I have no further questions.

Atty. Borne:

That's the City's case.

* * * *

DECISION OF THE COURT:

As far as Mr. Lewis is concerned, I will dismiss that charge on a technicality because the streets run parallel and there is a mistake in the affidavit, but as far as

[Tr. 42] DECISION OF THE COURT:

the defendant, Mrs. Mallie Lewis, I find her guilty of violating Ordinance 828 MCS, Section 49-2, resisting arrest and Section 49-7 reviling the police and sentence her to pay a fine of $10.00 or serve 10 days in jail on each charge. As far as the defendant, Joseph Lewis, Sr., is concerned, he is dismissed.

Atty. Portman:

I give notice of an appeal.

Court:

Appeal is granted and certified copy of Ordinance 828 MCS, Section 49-2 and 49-7 is hereby made part of the record.

* * * [Certificate Omitted in Printing] * * *

JUDGMENT OF THE CRIMINAL DISTRICT COURT AFFIRMING CONVICTIONS, DECEMBER 15, 1970

No. 217-361, Section "E"

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

STATE OF LOUISIANA

versus

MALLIE LEWIS

In the Matter of: City of New Orleans versus Mallie Lewis—Affidavit No. 110895

JUDGMENT

This matter is on appeal to this Court from the Municipal Court of the City of New Orleans wherein the defendant is charged with resisting arrest and reviling the police. .

Counsel for defendant, after the trial, filed a Motion in Arrest of Judgment, on the grounds that M.C.S. Section 49-7 was unconstitutional because "it is unconstitutionally vague and overbroad". Section 49-7 defines in detail what shall constitute reviling the police and, therefore, is not vague or overbroad and the defendant by said ordinance is prohibited from cursing or using obscene language to any member of the New Orleans Police Department.

The Motion in Arrest of Judgment was properly overruled by the lower court.

The conviction and sentence of the lower court are affirmed.

New Orleans, Louisiana, this 15th day of December, 1970.

/s/ Rudolph F. Becker, Jr.
RUDOLPH F. BECKER, JR.
Judge, Section "E"

ORDER OF THE LOUISIANA SUPREME COURT
REFUSING WRITS, MARCH 10, 1971

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

March 10, 1971

No. 51,231

CITY OF NEW ORLEANS

v.

MALLIE LEWIS

In re: Mallie Lewis applying for writs of certiorari, review, mandamus and prohibition.

Writ refused. The judgment of the lower court is correct.

/s/ JWS

/s/ EHMcC

/s/ WBH

/s/ FWS

DIXON, J., dissents from refusal, being of the opinion that the ordinance is clearly unconstitutionally vague, overbroad and is an unlawful restriction upon freedom of speech.

Order of the United States Supreme Court Vacating Judgment and Remanding the Case, June 26, 1972

SUPREME COURT OF THE UNITED STATES

Mallie Lewis

v.

City of New Orleans

On Appeal From the Supreme Court of Louisiana

No. 70-5323

Decided June 26, 1972

The motion for leave to proceed *in forma pauperis* is granted.

The judgment is vacated and the case is remanded to the Supreme Court of Louisiana for reconsideration in light of *Gooding* v. *Wilson*, 405 U.S. —— (1972).

Mr. Justice Powell, concurring in the result.

Under *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), the issue in a case of this kind is whether "fighting words" were used. Here a police officer, while on the performance of his duty, was called "G__ D__ M__ F__" police.

If these words had been addressed by one citizen to another, face to face and in a hostile manner, I would have no doubt that they would be "fighting words." But the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen. See Model Penal Code § 250.1, Comments, at p. 14 (Tent. Draft No. 13, 1961).

I see no genuine overbreadth problem in this case for the reasons stated in my dissenting opinion in *Rosenfeld* v. *New Jersey*, *post*, p. ——.

I would remand for reconsideration only in light of *Chaplinsky*.

Dissent by MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join.

Dissent by MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join.

(See both dissents printed with *Rosenfeld* v. *New Jersey*, decided this date.)

JUDGMENT AND OPINIONS OF THE LOUISIANA SUPREME COURT AFFIRMING CONVICTIONS, NOVEMBER 6, 1972

SUPREME COURT OF LOUISIANA

No. 51,231

CITY OF NEW ORLEANS

vs.

MALLIE LEWIS

ON REMAND FROM THE UNITED STATES SUPREME COURT

HAMLIN, Justice:

The United States Supreme Court, June 26, 1972, vacated the judgment of our Court of March 10, 1971 in City of New Orleans vs. Mallie Lewis, which recited: "Writ refused. The judgment of the lower court is correct." It remanded the cause to us for reconsideration in the light of Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L. Ed. 2d 408 (1972). 408 U.S. 913, 92 S.Ct. 2499, 33 L. Ed. 2d. 321 (Mr. Chief Justice Burger, with whom Mr. Justice Blackmun and Mr. Justice Rehnquist joined, dissented.)

Mallie Lewis was issued a citation for reviling the police on January 3, 1970; she was tried in the First Municipal Court, City of New Orleans, and found guilty of violating Ordinance 828 MCS, Section 49-2, resisting arrest, and Section 49-7, reviling the police. She was thereafter sentenced to pay a fine of $10.00 or serve ten days in jail on each charge.[1]

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[1] We do not have the record of the First Municipal Court before us, but Justice Lewis F. Powell, Jr., concurring in the remand of the United States Supreme Court stated, "* * * Here a police officer, while in the performance of his duty, was called, 'G__D__M__F' police."

An appeal was lodged in the Criminal District Court for the Parish of Orleans; that court affirmed the conviction and sentence.[2] Mallie Lewis then applied to this Court for writs, which, as stated supra, were refused. 257 La. 993, 244 So.2d 860. An appeal was taken to the United States Supreme Court where defendant was granted the instant remand.

Herein, Mallie Lewis avers that the First Municipal Court, City of New Orleans, and the Criminal District Court for the Parish of Orleans erred in holding the reviling the police ordinance, 828 M.C.S. 49-7, constitutional.

Counsel for Mallie Lewis submits:

"The Ordinance involved here suffers from all the defects of the Georgia statute and more. There are not even in the New Orleans ordinance the requirements that the words be spoken 'without provocation,' that the words 'tend to cause a breach of the peace,' or that the words be spoken 'in the presence' of the one spoken about. Like the Georgia statute the New Orleans ordinance sweeps within its proscription all forms of abusive and derogratory speech. Even more so than was the case with the Georgia statute, it is impossible to justify the ordinance under the narrow exception to free speech provided in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942).

"The New Orleans ordinance, 828 M.C.S. 49-7, must be found unconstitutional under *Gooding* v. *Wilson*, *supra*. Defendant Lewis' convictions for reviling the police and

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[2] The judgment of the Criminal District Court for the Parish of Orleans recites in part:

"A review of the evidence in this case fully convinces this court that the defendant violated both Section 49-2 and 49-7 of Ordinance 828 M.C.S.

"Counsel for defendant, after the trial, filed a Motion in Arrest of Judgment, on the grounds that M.C.S. Section 49-7 was unconstitutional because 'it is unconstitutionally vague and overbroad.' Section 49-7 defines in detail what shall constitute reviling the police and, therefore, is not vague or overbroad and the defendant by said ordinance is prohibited from cursing or using obscene language to any member of the New Orleans Police Department.

"The Motion in Arrest of Judgment was properly overruled by the lower court.

"The conviction and sentence of the lower court are affirmed."

for resisting arrest must be reversed with instructions to discharge the defendant Lewis."

Counsel's constitutional attack of Section 49-7, 828 M.C.S., is based on alleged overbroadness and vagueness; the Section as certified by the Assistant Clerk of Council recites:

> "Section 49-7. *Cursing, etc., police prohibited.* "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty. (Flynn's Digest 1896, art. 1363.)"

The City of New Orleans contends that due to prior decisions of the United States Supreme Court and to the particularized scope of Section 49-7, where "wanton" cursing and reviling of a police officer must occur while he is in the performance of his duty, the Section is not vague and overbroad as contended by defendant. It prays that the judgments of the lower courts upholding the constitutionality of Section 49-7 be affirmed.

I.

Initially, we shall discuss the case of Gooding v. Wilson. The defendant was convicted in the Georgia courts on two counts of using opprobrious words and abusive language in violation of Georgia Code Section 26-6303 which recited:

> "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor."

Habeas Corpus proceedings in the District Court for the Northern District of Georgia were taken, and the District Court held Georgia Code Section 26-6303 unconstitutionally vague and broad, 303 F.Supp. 952; it set aside the defendant's conviction. The Court of Appeals for the Fifth Circuit affirmed, 431 F.2d 855 (1970);

the United States Supreme Court noted probable jurisdiction of the State's appeal; it affirmed.

In Gooding, the Supreme Court stated: "* * * In other words, the statute must be carefully drawn or be authoritatively construed to punish only *unprotected speech* and not be susceptible of application to protected expression. * * *" 92 S.Ct. at p. 1106. (Emphasis ours) The Court further stated: "* * * Our decisions since *Chaplinsky* have continued to recognize state power constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression, Cohen v. California, *supra*, 403 U.S., at 20, 91 S.Ct., at 1785; Bachellar v. Maryland, 397 U.S. 564, 567, 90 S.Ct. 1312, 1314, 25 L. Ed. 2d 570 (1970); see Street v. New York, 394 U.S. 576, 592, 89 S.Ct. 1354, 1365, 22 L. Ed. 2d 572 (1969). We reaffirm that proposition today." 92 S.Ct. at pp. 1106-7.

In affirming the District Court and the Court of Appeals, the United States Supreme Court concluded in Gooding v. Wilson as follows:

> "We conclude that '[t]he separation of legitimate from illegitimate speech calls for more sensitive tools than [Georgia] has supplied.' Speiser v. Randall, *supra*, 357 U.S., at 525, 78 S.Ct., at 1342. The most recent decision of the Georgia Supreme Court, Wilson v. State, *supra*, in rejecting appellee's attack on the constitutionality of § 26-6303, stated that the statute 'conveys a definite meaning as to the conduct forbidden, measured by common understanding and practice.' 223 Ga., at 533, 156 S.E.2d, at 448. Because earlier appellate decisions was no likelihood that the person addressed would make an immediate violent response, it is clear that the standard allowing juries to determine guilt 'measured by common understanding and practice' does not limit the application of § 26-6303 to 'fighting' words defined by *Chaplinsky*. Rather, that broad standard effectively 'licenses the jury to create its own standard in each case.' Herndon v. Lowry, 301 U.S. 242, 263, 57 S.Ct. 732, 741, 81 L. Ed. 1066 (1937). Accordingly, we agree with the conclusion of the District

> Court, [t]he fault of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application.' 308 F. Supp., at 955-956. Unlike the construction of the New Hampshire statute by the New Hampshire Supreme Court, the Georgia appellate courts have not construed § 26-6303 'so as to avoid all constitutional difficulties.' United States v. Thirty-Seven (37) Photographs, *supra*, 402 U.S., at 369, 91 S.Ct., at 1405.

"Affirmed."

We do not find Georgia Code Section 26-6303 as written and Section 49-7, 828 M.C.S. New Orleans, Louisiana, similar. The Georgia section provided that the prohibited language would have to tend to cause a breach of the peace. Sec. 49-7 provides that it *shall* be a breach of the peace to use the prohibited language toward or with reference to any member of the city police *while in the actual performance of his duty*. Our section is restricted to any member of the city police; it is narrow; it is specific.[3] The Georgia Section was not specific or narrow; it pertained "to or of another."

II.

There is a major difference between a member of the city police while in the actual performance of his duty and "another." Black's Law Dictionary, Revised Fourth Edition, 1968, defines a Police Officer as: "One of the staff of men employed in cities and towns to enforce the municipal police, i.e., the laws and ordinances for preserving the peace and good order of the community. Otherwise called 'policemen.'" See, 62 C.J.S. Municipal Corporations, Sec. 568, p. 1090 et seq.; 47 Am. Jur. Sheriffs,

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[3] In National Ass'n for Advance. of Colored People v. Button, the U. S. Supreme Court at 83 S. Ct. p. 338 said: "* * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. Cantwell v. Connecticut, 310 U.S. 296, 311, 60 S. Ct. 900, 906, 84 L. Ed. 1213."

Police, and Constables, Sec. 5, Peace Officers as Public Officers, p. 823 et seq.

In Green v. City of Bennettsville, 15 S.E.2d 334, 336 (1941), the Supreme Court of South Carolina stated:

" 'Policeman' has been defined as: 'A member of the Police.' 'Police' is defined: 'An organized civil force for maintaining order, preventing and detecting crime, and enforcing the laws; the body of men by which the municipal laws and regulations of a city, town, or district are enforced.' Webster's Twentieth Century Dictionary, Unabridged. And again it is defined:

" 'That species of superintendence by magistrates which has principally for its object the maintenance of public tranquility among the citizens. The officers who are appointed for this purpose are also called the police. * * *

" 'The word *police* has three significations. The *first* relates to the measures which are adopted to keep order, the laws and ordinances on cleanliness, health, the markets, etc. The *second* has for its object to procure to the authorities the means of detecting even the smallest attempts to commit crime, in order that the guilty may be arrested before their plans are carried into execution and delivered over to the justice of the country. The *third* comprehends the laws, ordinances, and other measures which require the citizens to exercise their rights in a particular form." See, Wyndham v. United States, 197 F.Supp. 856 (1961).

"Policemen of a city or town are peace officers and a policeman is a public officer, whose duties relate to governmental functions of a municipality." Klam v. Boehm, 240 P.2d 484 (1952). "* * * the term 'Policemen,' as that term is generally used and understood, means a person who is a member of an organized civil force for maintaining peace and order, preventing and detecting crime, and enforcing the law. A policeman of a city is a person who has been authorized and empowered by the city to perform duties which relate to its governmental function of maintaining peace and order." Tezeno v. Maryland Casualty Company, 166 So.2d 351, 356 (1964).

The above jurisprudence affirms that a police officer is a peace officer and that he keeps the peace; it stands

to reason that wantonly cursing or reviling, or using obscene or opprobrious language toward or with reference to any police officer while in the actual performance of his duty is a breach of the peace. "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others." Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 1220.

Freedom of Speech is protected by the First and Fourteenth Amendments to the United States Constitution; however, the United States Supreme Court in National Ass'n for Advance. of Colored People v. Button, 83 S.Ct. at 341, stated: "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." The Court also stated in Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 95 L. Ed. 295, 300 (1950):

"The Court respects, as it must, the interest of the community in maintaining peace and order on its streets." Thus, as ably urged by counsel for the City of New Orleans, the City of New Orleans as an arm of the State has a compelling interest in preserving the efficient and effective operation of its police department which in turn provides for law and order on the streets. Wanton interference with a policeman while he is endeavoring to discharge his duties creates a threat to the community at large. Here, a vital State interest is in question, i.e., the efficient operation of an officer of the law while in the discharge of his duties. We find that protected speech does not apply to Section 49-7 supra. The vital and compelling interest of the City of New Orleans justifies the prohibition of certain language to a member of the city police while in the actual performance of his duties.

III.

In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L. Ed. 2d 642

(1972), the United States Supreme Court said: "It is well-settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." The Court further stated in Grayned v. City of Rockford, —— U.S. ——, 92 S.Ct. 2294 (1972), —— L.Ed.2d ——, that: "The nature of a place, 'the pattern of its normal activities, dictates the kinds of regulations of time, place and manner that are reasonable.' * * * The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest. 'Access to [the streets, sidewalks, parks, and other similar public places] for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly. . . .' Free expression 'must not, in the guise of regulation, be abridged or denied.'"

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or *'fighting'* words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instruction.' Cantwell v. Connecticut, 310 U.S. 296, 309, 310,

84 L.Ed. 1213, 1221, 60 S.Ct. 900, 128 ALR 1352." Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031, 1035 (1942).[4] (Emphasis ours)

IV.

Our consideration of the instant matter is made, as we have been directed by the United States Supreme Court, in the light of Gooding v. Wilson, 405 U.S. ——, 92 S.Ct. 1103, 31 L.Ed.2d 408. In Gooding, as quoted supra, the Court recognized the doctrine of Chaplinsky as still alive and said that the Supreme Court's decisions have recognized State power as being able to punish constitutionally "fighting words."[5]

Section 49-7 supra recites that: "It shall be unlawful and a breach of the peace for any person *wantonly* to

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[4] The statute involved in Chaplinsky, a New Hampshire statute, recited: "No person shall address any offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation." In upholding the statute, the United States Supreme Court stated:

"We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace.* * *

"Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."

[5] See also, Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 1785, 29 L. Ed. 2d 284, wherein the Court stated: "This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizens, are, as a matter of common knowledge, inherently likely to provoke violent reaction. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). * * *"

curse or revile or to use obscene or opprobrious language * * *." (Emphasis ours) We find and believe that it is self evidence that what is prohibited are "fighting words" which cannot enjoy the protection of the First and Fourteenth Amendments to the United States Constitution. We find that under the above authorities of the United States Supreme Court it was within the power of the City of New Orleans, an arm of the State, to regulate the conduct of any person towards a member of the city police while in the actual performance of his duty by prohibiting the use of "fighting words" to such policeman. Permitting the cursing or reviling of or using obscene or opprobrious words to a police officer while in the actual performance of his duty would be unreasonable and basically incompatible with the officer's activities and the place where such activities are performed. Wantonly cursing, reviling, or using obscene or opprobrious words are not protected means of communication. Prohibiting such is not a restraint of the area of public discussion; such prohibition will not render the citizenry incapable.* As found supra herein, we find that Section 49-7 is not offensive to protected speech; it is narrowed to "fighting words" uttered to specific persons at a specific time; it is not overbroad and is therefore not unconstitutional.

George Code Section 26-6303 supra recited that "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, * * *." Section 49-7 prohibits "any person *wantonly* to curse or revile or to use obscene or opprobrious language * * *." (Emphasis ours)

We find that the prohibitions of Section 49-7 are self explanatory; they are not vague. Any reasonable man

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* In Cohen v. California, supra, the Court said of Free Speech: "* * * It is designed and intended to remove government restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. * * *" 91 S. Ct. at p. 1788.

knows what it is to wantonly curse or revile; our Section is not confined to "opprobrious words or abusive language," as was the Georgia statute.[1] *The Section definitely does not sweep within its proscriptions all forms of abusive and derogatory speech.* The proscriptions are narrow and specific—wantonly cursing, reviling, and using obscene or opprobrious language.

We conclude that Section 49-7 is not vague; it is constitutional and meets the test of Coates v. City of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), an ascertainable standard.

Having thoroughly considered this cause in the light of Gooding v. Wilson, 405 U.S. ——, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972), we now hold that Section 49-7, 828 M.C.S., New Orleans, Louisiana, is constitutional.

It is ordered and decreed for the reasons above assigned that Mallie Lewis' convictions and sentences be affirmed; the judgments of the First Municipal Court, City of New Orleans, and the Criminal District Court for the Parish of Orleans are affirmed.

BARHAM, J., dissents with written reasons.

TATE, J., dissents with written reasons.

DIXON, J., dissents and subscribes to the reasons enunciated in Justice Tate's dissent.

BARHAM, Justice (dissenting).

This case was remanded to us for consideration in light of Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). For the reasons assigned by the United States Supreme Court in that case we are required to declare the municipal ordinance, 828 M.C.S. 49-7, unconstitutional. I concur in Mr. Justice Tate's dissent.

TATE, Justice (dissenting).

The defendant was here convicted of violating a municipal ordinance which forbids reviling the police. She cursed the police after they had arrested her son.

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[1] The word "wantonly" does not appear; only the words "without provocation." Our ordinance provides for cursing or reviling or using obscene or opprobrious language. The Georgia statute is confined to opprobrious words or abusive language.

A majority of this court initially denied supervisory review, rejecting the contention that the ordinance was unconstitutional on its face. 257 La. 993, 244 So.2d 860 (1971). The dissent expressed the view that the ordinance "is clearly unconstitutionally vague, overbroad and is an unlawful restriction upon freedom of speech". 244 So.2d 860.

The United States Supreme Court then granted certiorari and reversed this court. Lewis v. City of New Orleans, 408 U.S. 913, 92 S.Ct. 2499 (1972). The sole issue raised was that the ordinance is unconstitutional on its face. The high court remanded the case to us "for reconsideration in the light of Gooding v. Wilson, 405 U.S. 518 (1972)". Despite this and the circumstance that the ordinance here in question is constitutionally deficient under the standard expressed by *Gooding* v. *Wilson*, the majority again affirms the conviction.

At issue here is the contention that an ordinance of the City of New Orleans violates the First Amendment (freedom of speech) protections of the United States Constitution. See also Louisiana Constitution of 1921, Article 1, Section 3.

The ordinance in question makes it "unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the City Police while in the actual performance of his duty". Section 49-7, City of New Orleans (Adopted by Ordinance No. 828).

We should at this point note the following: Under the broad scope of the terms of the ordinance: The punishable speech includes (1) wantonly (recklessly) used "opprobrious" [1] language "with reference to" an officer engaged in the performance of his duty, (2) which lan-

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[1] As the United States Supreme Court noted in Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103 at 1107, under its definition "opprobrious" includes greater reach than "fighting words." (This was one reason the Georgia statute was declared unconstitutional.) The Court noted that Webster's New International Dictionary (1961) defines "opprobrious" as "conveying or intended to convey disgrace".

guage need not be used in the presence of the officer[2], (3) nor be of a nature tending to cause an immediate public disturbance nor used in such circumstances as likely to cause such a disturbance. Further, the punishable language need not interfere with the officer in the performance of his duty; it is sufficient only that the words be opprobrious with reference to the officer.[3]

Thus, for instance, a person sitting on a balcony overlooking the efforts of a policeman to direct traffic in the crowded French Quarter could, under the terms of the ordinance, be prosecuted for muttering, "Look at that stupid cop messing things up down there". The epithet may be used wantonly, in that it recklessly and willfully reviles the heroic efforts of the police officer. The language is punishable under the terms of the ordinance, even though the muttered opprobrious comment was overheard only by a bystander-witness up on the balcony with the "reviler", and though the policeman and no one else heard the mutter, and though the muttered criticism did not at all interfere with the unaware policeman's conduct of his duties.

We should at this point note as unquestioned the basic American philosophy that freedom of speech protects us against criminal prosecution for criticizing or even using abusive or opprobrious language with regard to our public officials and our government. As noted in Gooding v. Wilson, 405 U.S. ——, 92 S.Ct. 1103 (1972), to which we were referred by the United States Supreme Court when it reversed our prior affirmance of this same

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[2] See Chaplinsky v. New Hampshire, 315 U.S. 568, 573, 62 S.Ct. 766, 770 (1942), saving from invalidity a statute since it did "no more than prohibit the *face-to-face* words plainly likely to cause a breach of the peace." (Italics mine.)

[3] As the majority notes (see its footnote 2), the Criminal District Court for the Parish of Orleans, with primary responsibility to review convictions under this ordinance, held that the statute is not vague or overbroad since it "defines in detail what shall constitute reviling the police", for by said ordinance the defendant was "prohibited from cursing or using obscene language to any member of the New Orleans Police Department." Under this meaning, the statute clearly offends the United States Constitution, see *Gooding* v. *Wilson*, cited above.

conviction, even harsh insulting words cannot be punished except such as by their very utterance "tend to incite an immediate breach of the peace". 92 S.Ct. 1107.

In Gooding v. Wilson, 405 U.S. ——, 92 S.Ct. 1103 (1972), the United States Supreme Court held to be unconstitutional a Georgia statute punishing "any person who shall without provocation, use to or of another, *and in his presence* . . .[4] opprobrious words or abusive language, tending to cause a breach of the peace . . .", 92 S.Ct. 1104 (Italics mine.). Since the Georgia statute (like the present ordinance) punished only spoken words, the Supreme Court noted that "It can therefore withstand appellee's attack upon its facial constitutionality only if, as authoritatively construed by the Georgia courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments." 92 S.Ct. 1105.

The court pointed out that "the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' " 92 S.Ct. 1105. The court explained: "This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." 92 S.Ct. 1105.

The Georgia statute was invalid because it was not "narrowly drawn to apply only to a constitutionally unprotected class of words—'fighting' words—'those which by their very utterance inflict injury or tend to incite an immediate breach of the peace' ". 92 S.Ct. 1106. The court specifically pointed out that an enactment which

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[4] Note that the Georgia statute here invalidated contains, unlike the municipal ordinance in question, the limitation that the offending language be used in the presence of the reviled person. All the more reason that the present municipal ordinance is unconstitutional. See Chaplinsky v. State of New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942).

permits criminal punishment of the use of "opporbrious" language overbroadly includes within its prohibition merely derogatory comments, not necessarily "fighting words". 92 S.Ct. 1107.

No authoritative Louisiana interpretation narrows the scope of this ordinance to include language tending to incite an immediate breach of the peace, "fighting words". In fact, quite the contrary is so. See footnote 2 and the majority opinion. The majority here holds that it may be made a criminal breach of the peace "wantonly" to use epithets or personal abuse with regard to a police officer while in the performance of his duty—indeed, this may be so, by a statute limited in application to those situations where the language creates the danger of an immediate public disturbance—, but it overlooks that the present statute, under its terms, punishes not only words used in such context, but also non face-to-face or peaceful or even private expressions of opprobrious comments. The mother is punishable under the ordinance for using the disrespectful language in her own living room as well as in the street.

The circumstance that, under the ordinance, such epithets must be used "wantonly"—that is, recklessly, willfully, see State v. Vinzant, 200 La. 301, 7 So.2d 917 (1942), 44A Words and Phrases, "Wanton"—does not so narrow the language criminally punishable as to save this enactment from overbroadness. That the opprobrious language must be used "wantonly"—recklessly, willfully —does not deprive it of constitutional protection, where not uttered under circumstances likely to cause an immediate public disturbance. As a matter of fact, as interpreted by our state courts, the simple "cursing or using obscene language to any member of the New Orleans Police Department" has been regarded as wanton reviling which is punishable under the ordinance. See Footnote 2.

The ruling in *Gooding* v. *Wilson* is decisive of this case, as the United States Supreme Court indicated by ordering us to consider the present conviction in the light of that decision.

The language there used by the defendant to a Georgia police officer was "White s_ of a b__, I'll kill you" and "You s_ of a b__, I'll choke you to death". See 92 S.Ct. 1112. In the present case, the mother called the police officer a "G_ d__ m___ f___" police. The fact that the latter words used are shocking to the sensibilities of people of our generation does not by itself justify classifying such critical language as not protected by the constitution. See Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780 (1971).

Whatever our personal views are as to what sort of language should or should not be punishable, this court is bound by our state and federal constitutions to enforce constitutional protection of individuals and their speech as interpreted by authoritative decisions of the nation's high court. That court has reversed us in the present case for not applying such principles announced by it. It has directed us to reconsider the *present* conviction in the light of *Gooding* v. *Wilson*. *Gooding* plainly indicates that the present ordinance is unconstitutionally overbroad on its face, just as was the quite similar Georgia statute in that case, in that it subjects to punishment constitutionally protected language as well as language not so protected.

The police, our front line soldiers in the battle against crime, deserve the respect and support of our officials and citizens. Nevertheless, ever since this nation fought for and obtained its freedom, it has not been a crime to curse or use opproprious language about the public officers of our democratic republic. If, for instance, the present ordinance had made it a crime wantonly to curse or revile members of the United States Supreme Court or of the state judiciary (or the Governor, or the legislators or any other public officer or serveant), as well as the police, I am certain that not one of the majority would deem such an enactment constitutional. The right to criticize our public officers, be they judges or policemen, has, since our earliest days, been deemed a basic right of all Americans. The harshness or unfairness of language used in such critical commentary does not remove it from protection of our constitution. Freedom of

speech is protected not only for our newspapers and politicians, but also for our citizens on back streets of slum areas.

Although it is immaterial to the issue before use (since the enactment is invalid on its face), I must emphasize once again that the sole action of the defendant hereby punished was her use of obscene language toward the policemen after they had arrested her son. She is not being prosecuted for public obscenity. There is no suggestion in the limited record in this court that such language had any tendency to cause a fight or public disturbance or to interfere with the police in the performance of their duties.[5]

To repeat, the United States Supreme Court has reversed this court's prior rejection of the attack on the ordinance for being overbroad in scope and violative of the First Amendment. It is not our function to refuse to apply the direct ruling of the nation's high court because we disagree with it. Orderly processes of adjudication and the rule of law suffer when an inferior tribunal refuses to follow the law as enunciated by a higher court.

I therefore respectfully dissent.

* * * *

[5] It is to be noted that other statutes are available to punish conduct which actually hampers law enforcement. See, e.g., La.R.S. 14:108 (resisting an officer), La.R.S. 14:111 (assisting an escape), and La.R.S. 40:1390 (interference with state police officers in the performance of their duties).

[6] On October 24, 1972, in an as yet unreported decision (docket No. 71-6627), the United States Supreme Court again reversed a majority of this court's similar holding in City of New Orleans v. Martin, 260 La. 691, 257 So.2d 152 (1972) that the ordinance was unconstitutional.

SUPREME COURT OF THE UNITED STATES

No. 72-6156

MALLIE LEWIS, APPELLANT

v.

CITY OF NEW ORLEANS

ON CONSIDERATION of the motion of the appellant for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

June 4, 1973

SUPREME COURT OF THE UNITED STATES

No. 72-6156

MALLIE LEWIS, APPELLANT

v.

CITY OF NEW ORLEANS

APPEAL FROM the Supreme Court of the State of Louisiana.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

June 4, 1973

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